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No. 09-

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN E. NAYTHONS,

Petitioner,

v.

STRADLEY, RONON, STEVENS & YOUNG, LLP, and ANDRÉ L. DENNIS,

Respondents.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal court exercising diversity jurisdiction properly extend a state common law privilege to a legal context where the state courts themselves have not applied it, thereby virtually negating either a common law or statutory cause of action of that state which by its nature is inconsistent with the applicability of the privilege?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Hon. Edwin E. Naythons, U.S.M.J. (ret.); the Philadelphia law firm of Stradley, Ronon, Stevens & Young, LLP; and André L. Dennis, Esq., a partner at the Stradley firm).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWIN E. NAYTHONS respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed and entered on July 30, 2009.

OPINIONS BELOW

The Third Circuit's non-precedential Opinion (per Fuentes, J., with Rendell & Roth, JJ.) was filed on July 30, 2009. A copy is attached as Appendix A; see Naythons v. Stradley, Ronan, Stevens & Young, LLP, 2009 WL 2329915.[1] The opinion of the United States District Court for the Eastern District of Pennsylvania (Bumb, J., D.N.J., sitting by designation), filed April 30, 2008, is available sub nom. Naythons v. Stradley, Ronon, Stevens & Young, LLP, 2008 WL 1914750. A copy is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the dismissal of petitioner's civil action was filed and entered on July 30, 2009; Appx. A. A timely petition for

[1] The second name in the "Stradley, Ronon" firm's name is misspelled in the Third Circuit's official caption, and that error is replicated in the WestLaw version.

rehearing was filed, but was denied on August 26, 2009. Appx. C. On November 13, 2009, under No. 09A454, Justice Alito extended the time for filing this petition by 30 days, to and including December 24, 2009. This petition is timely filed on or before that date. Rules 13.1, 13.3, 13.5; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL AND STATE STATUTES INVOLVED

The Judicial Code of the United States provides, in pertinent part:

> **State Laws as Rules of Decision.**
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652.

The Judiciary Code of the Commonwealth of Pennsylvania provides, in pertinent part, that:

> The award of an arbitrator in a nonjudicial arbitration which is not subject to Subchapter A (relating to statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregu-

larity caused the rendition of an unjust, inequitable or unconscionable award.

42 Pa.Cons.Stat. § 7341.

The Pennsylvania Judiciary Code further provides:

> **(a) Elements of Action.** -- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings[, if]:
>
> (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) the proceedings have terminated in favor of the person against whom they are brought.
>
> * * * *

42 Pa.Cons.Stat. § 8351 (the "Dragonetti Act").

STATEMENT OF THE CASE

This petition presents a recurring issue of federalism arising in the context of the district courts' diversity jurisdiction.

a. **The Course of Proceedings**

(i) The Underlying State Court Proceedings and Arbitration. Petitioner Edwin E. Naythons is a retired United States Magistrate Judge who practices as an arbitrator in the Philadelphia area. After contentious litigation over the assets and leadership of a local Philadelphia church had languished and festered for a decade in the Court of Common Pleas (see, e.g., Church of the Lord Jesus Christ of the Apostolic Faith, Inc. v. Shelton, 740 A.2d 751 (Pa.Commw. 1999)), the parties agreed on November 30, 2005 (misstated as "2006" in both opinions below, Appx. A3, B2), to submit their dispute to private ("common law") arbitration. 3d Cir. App. 66-67, 420-24. By order of the trial court filed January 10, 2006, the underlying civil case was dismissed, and there was to be "no right to appeal" by either party to any court from the arbitrators' decision. 3d Cir. App. 446, 783.

The parties selected a seven-member panel, with Judge Naythons, petitioner here, as the neutral and presiding arbitrator. Following a week-long evidentiary hearing and a day and a half of deliberations, the other six arbitrators were equally divided. It thus fell to petitioner to reach a decision. Appx. B3. In April 2006 Judge Naythons issued a lengthy initial adjudication, with detailed findings of financial misconduct by the defendant church leaders. 3d Cir. App. 70. The arbitrator issued a supplemental adjudication on May 8, 2006. 3d Cir. App. 485, 756. Petitioner appointed a receiver for the church

property and ordered an outside, forensic accounting. Appx. B3; 3d Cir. App. 475.

The losing faction reacted angrily to petitioner's decisions. Notwithstanding the prior dismissal of the underlying case and the parties' agreement against appeal, over a dozen pleadings were filed attacking the adjudication. On July 10, 2006, however, the Court of Common Pleas ruled that these efforts to evade the no-appeal stipulation were "disingenuous," 3d Cir. App. 771; the court thus dismissed all the challenges pursuant to 42 Pa.Cons.Stat. § 7341,[2] and confirmed the April adjudication. 3d Cir. App. 770-72. The defendants filed an appeal of that order. 3d Cir. App. 406.

Response to the April adjudication was not limited to court proceedings. Judge Naythons was the subject of an anonymous death threat, posted on an internet social networking ("MySpace") site.[3]

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[2] See Statutes Involved ante.

[3] Posted May 5, 2006, at 9:03 p.m. by "NaTuRaL SwAg" (who claimed to be a 16-year-old girl from Snellville, Georgia), the fourth paragraph reads, in pertinent part, "I hate stupid heads who dont think their action through ... oh and I feel sorry for that JUDGE because the moment BOS says its ok all those sisters are gonna give him a word or two, some saints gonna send him hate mail and stalk him and get him good. He better go in cog neto .. lol .. lol .. that will be funny them sister were ready to take them h[ee]ls off sunday and kick some butt .. lol." 3d Cir. Appx. 647 (sic). The context of the threat and the reference to "BOS" implied some connection with the losing faction in the litigation, but whether this was actually true was unknown. 3d Cir. Appx. 660-70.

Counsel for the prevailing plaintiff called the threat to the attention of petitioner's employer (the arbitration firm)'s administrator (with notice to defense counsel) by letter dated June 5, 2006, but petitioner was mistakenly not told of the threat until July 27. In the meantime, he had completed drafting his final adjudication. The final adjudication, dated July 25, 2006, was filed a few days later. Appx. B3; 3d Cir. App. 799.

The threat and the defendants' resultant suggestion for recusal was discussed among counsel at an on-the-record conference on August 3, 2006, but Judge Naythons expressed a disinclination to recuse himself. 3d Cir. App. 89-117; Appx. B3-B4. Following the conference, petitioner, through counsel, rejected a written request for his recusal. 3d Cir. App. 125. From August through November, literally dozens of additional pleadings were filed under numerous docket numbers, all seeking to upset the final arbitration, including a formal motion for recusal (which named petitioner Naythons as a "party in interest"). In these papers, almost all of which were publicly filed, respondents -- as counsel for the losing parties -- harshly accused the petitioner of misconduct, dishonesty, bias and fraud in his adjudication of the case. 3d Cir. App. 860-66.

On appeal from the order of the Court of Common Pleas confirming the arbitrators' adjudication, the Commonwealth Court of Pennsylvania vacated and remanded. Shelton v. Patterson, Nos. 1967-CD-06, 1968-CD-06, noted at 942 A.2d 967 (Pa.

Commw., Jan. 31, 2008) (table), all. app. denied, 600 Pa. 734, 963 A.2d 471 (Oct. 14, 2008). The court ruled that the relief granted in the adjudication had exceeded the scope of the dispute submitted to arbitration, that is, the issues properly presented in the particular underlying civil case.[4] The denial of recusal was not an issue on appeal, and the vacatur did not disturb the denial of recusal.

(ii) The Federal Case. Petitioner Naythons filed suit in the U.S. District Court for the Eastern District of Pennsylvania, invoking the federal court's diversity jurisdiction. The complaint set forth two causes of action -- common law abuse of process, and wrongful use of process, pursuant to 42 Pa.Cons.Stat. § 8351 (the "Dragonetti Act")[5] -- against the attorneys who had filed what petitioner characterized as strident, personal and untruthful recusal papers. The complaint alleged that the improper recusal filings had severely damaged his previously excellent and hard-earned reputation as an impartial jurist and had cost him dearly in retainers for future arbitrations.

On motion under Fed.R.Civ.P. 12(b)(6), the district court dismissed the complaint. Appx. B. U.S.

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[4] Neither this Commonwealth Court opinion nor any document in the record explains why the parties' agreement that there would be no appeal to any court did not waive the statutory right to seek confirmation or disapproval of the arbitration award in the trial court, or to appeal from that order.

[5] See Statutes Involved ante.

District Judge Renee Bumb (D.N.J., sitting by designation) faulted the abuse of process claim on the basis that the recusal motion did not constitute legal process used "against" the petitioner, because he was neither a party nor in a party-like status in the state court litigation. In support of the adverse ruling on "standing," the judge cited Cruz v. Princeton Ins. Co., 925 A.2d 853 (Pa.Super. 2007) (en banc), without mentioning that this decision had been summarily reversed by the state Supreme Court, 597 Pa. 67, 950 A.2d 269 (2008) (per curiam). App. B4.[6]

The district court bolstered that ruling with the opinion that petitioner had "failed to show" a "perversion of process," as required to establish the first cause of action, App. B6-B7 -- even though the matter was decided on the pleadings, and petitioner could not yet have "shown" anything at that point. The court also ruled that the statements by counsel in court pleadings were protected by a "judicial privilege" and could not be made the basis of liability for abuse of process. App. B5. Finally, the court dismissed the Dragonetti claim on the same standing grounds, and because the motions were not brought "against" petitioner. App. B8-B9.

On appeal, the Third Circuit panel affirmed on limited grounds. App. A. Flatly misstating, in part,

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[6] For its discussion of the elements of the state law cause of action, the Third Circuit cited instead the Superior Court's decision in the same case on remand following the summary reversal. Appx. A5, citing 972 A.2d 14 (Pa.Super. 2009) (en banc).

the district court's reasoning (Judge Bumb had ruled, for example, that petitioner's allegations of harm were sufficient, not insufficient; compare App. A2 with App. B7), the court of appeals affirmed the dismissal of petitioner's civil case on the sole ground that respondents enjoyed a "judicial privilege" to make false and damaging allegations against him in a recusal motion.[7] The panel did not address petitioner's argument that extending the doctrine of "judicial privilege" from its base in defamation law to the common law tort of abuse of process, or to a statutory Dragonetti claim, would almost entirely eviscerate those state law causes of action.

Rehearing was denied. Appx. C.

b. Lower Court Jurisdiction

The United States District Court for the Eastern District of Pennsylvania had subject matter

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[7] To avoid any confusion, petitioner points out immediately that the doctrine of "judicial privilege" in Pennsylvania, and as invoked in this case, has nothing to do with the fact that petitioner is a former judge and was acting in a quasi-judicial capacity in sitting as an arbitrator. "Judicial privilege" is the protection afforded to litigants in Pennsylvania from liability arising out of what they may say or write in the proper course of judicial proceedings, such as in good faith pleadings or in court testimony. E.g., Binder v. Triangle Publications, Inc., 442 Pa. 319, 323-24, 275 A.2d 53 (1971). The federal courts grant and enforce a similar privilege. See Briscoe v. LaHue, 460 U.S. 325 (1983) (witness immunity). Judicial immunity, of course, is something else entirely. See Butz v. Economou, 438 U.S. 478, 508-14 (1978) (judge may not be sued for damages under 42 U.S.C. § 1983 for actions taken in that capacity). Judicial immunity is not implicated here, where the person exercising a quasi-judicial role (petitioner here) was the lawsuit plaintiff, not the putative civil defendant.

jurisdiction of this case under 28 U.S.C. § 1332(a); the complaint alleged a complete diversity of citizenship between petitioner and the respondents. The court of appeals had jurisdiction under 28 U.S.C. § 1291, as a dismissal of the entire complaint for failure to state a claim is a "final decision."

REASONS FOR GRANTING THE WRIT

The lower federal courts are in need of guidance on the limits that a U.S. district or circuit court should respect, when exercising diversity jurisdiction, in extending undeveloped areas of state law.

The court below affirmed the district court's dismissal of petitioner's civil complaint on the ground that the respondents enjoyed a "judicial privilege" to make false and damaging allegations against him in a legally frivolous recusal motion.[8] Respondents' clients stood to lose a substantial sum of money that petitioner had found they had misappropriated from the church treasury, as well as the power over church

[8] No one would seriously argue that a judicial officer must (or even should) recuse himself or herself because of a verbalized threat perceived to have originated with a party -- particularly right after an adverse preliminary decision has been announced. Otherwise, any party wishing to be rid of a judge thought to be unfavorable could easily arrange for the anonymous publication of the kind of threat involved here.

affairs that gave them access to such funds. The recusal motion was one of dozens of pleadings filed in court soon after petitioner's adverse adjudication was released. The court below cited no Pennsylvania case (nor had the district court) applying the defense of "judicial privilege" -- at the Rule 12(b)(6) stage or otherwise -- as a counter to properly pleaded averments of abuse of process. This Court should grant certiorari to address the considerations that federal courts should apply in deciding whether to extend state law defenses beyond what the state's highest court has allowed.

Judicial privilege has long been recognized in Pennsylvania as a proper -- indeed essential -- defense to actions for libel which are founded on statements made in support of positions taken by parties to judicial proceedings. E.g., Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967); Kemper v. Fort, 219 Pa. 85, 67 A. 991 (1907). Yet from the very beginning, Pennsylvania has recognized limits on the doctrine. Thus, in the earliest case, the Court suggested that statements in pleadings should be deemed privileged in a suit for libel only when the averments were "relevant and pertinent to the matter or matters to be inquired into by the court ..." Id. 93, 67 A. at 994-95.

The privilege does not extend to statements made outside such proceedings, however, even when related to judicial proceedings. See Post v. Mendel, 510 Pa. 213, 507 A.2d 351 (1986). And in LLMD of Michigan, Inc. v. Jackson-Cross Co., 559 Pa. 297, 740

A.2d 186 (1999), the Pennsylvania Supreme Court declined to allow judicial privilege (in its manifestation as "witness immunity") as a defense to an action for professional malpractice by an expert witness, who made a serious mathematical error in calculating lost profits in his report and was unable to recover when the error was exposed during his trial testimony.

Only the intermediate Pennsylvania appellate court has applied the doctrine of judicial privilege to causes of action other than defamation. And even then, while it has referred to actions for the common law tort of abuse of process or the statutory action for misuse of process, application of the privilege has been affirmed only once and never with any discussion. Thus, in Moses v. McWilliams, 379 Pa.Super. 150, 549 A.2d 950 (1988) (en banc), the Superior Court affirmed the dismissal of a medical malpractice action premised on an expert witness's breach of confidentiality based on absolute witness immunity.[9] The court relied on "the strong policy behind the privilege," 549 A.2d at 957, noting with apparent approval that several decisions had applied the privilege as a defense to causes of action other than defamation, including abuse of process. Review by the state supreme court was denied, 521 Pa. 631, 558 A.2d 532 (1989).

[9] Whether the holding in Moses remains good law in Pennsylvania after LLMD of Michigan, supra, is not entirely clear.

The Moses court cited Passon v. Spritzer, 277 Pa.Super. 498, 419 A.2d 1258 (1980), as a case in which judicial privilege was allowed as a defense to a lawsuit for abuse of process. That appeal arose out of a suit alleging libel and malicious use and abuse of process; the plaintiff had been named as the alternate murder suspect in a federal petition for habeas corpus filed by a state prisoner. The appeal decision mentions the abuse of process claim, but discusses only the libel action in affirming the dismissal. Passon is thus the weakest sort of authority for the proposition that Pennsylvania recognizes judicial privilege as a defense to abuse of process claims, and the reference to it in Moses is dictum. See also Brown v. Delaware Valley Transplant Program, 372 Pa.Super. 629, 539 A.2d 1372 (1988) (attorney sued on various theories for actions taken in representing hospital; dismissal of count alleging malicious use of process not among those appealed); Triester v. 191 Tenants Ass'n, 272 Pa.Super. 271, 415 A.2d 698 (1979) (applying judicial privilege as defense to action for disparagement of title; although case also involved counts alleging abuse and malicious use of process, applicability vel non of privilege defense to those claims was not raised).[10]

Finally, in Clodgo ex rel. Clodgo v. Bowman, 411 Pa.Super. 267, 601 A.2d 342 (1992), a Superior Court panel applied judicial privilege as an absolute defense

[10] Triester was one of the state court authorities cited by the district court in dismissing petitioner's action. Appx. B11.

to a lawsuit for medical malpractice against an expert witness who had misread the result of a DNA test and thus caused the plaintiff to lose her paternity suit. The court opined that "the form of the action is irrelevant to" application of the judicial privilege in Pennsylvania. Id. 344-45. The Superior Court added:

> Our precedent is clear. The form of the cause of action is not relevant to application of the privilege. Regardless of the tort contained in the complaint, if the communication was made in connection with a judicial proceedings [sic] and was material and relevant to it, the privilege applies.

Id. at 345. The "precedent" cited as "clear" in establishing this proposition was only Moses and Brown. As already discussed, neither case would support nearly so bold or broad a contention. An appeal of the Clodgo decision was granted by the state supreme court, but then dismissed as improvidently allowed. 533 Pa. 352, 625 A.2d 612 (1993). In any event, no claim for abuse or process was involved in Clodgo. The validity of Clodgo after the supreme court's decision seven years later in LLMD of Michigan is also questionable.

Continuing its cautious approach, the Pennsylvania Supreme Court most recently mentioned and left open the question whether "a claim for abuse of civil proceedings" can be predicated on claims made in a lawsuit claiming breach of fiduciary duty by a partner. See Stone Crushed Partnership v. Kassab

Archbold Jackson & O'Brien, 589 Pa. 296, 302 n.4, 908 A.2d 875, 879 n.4 (2006).[11]

In extending the doctrine of "judicial privilege" to the common law tort of abuse of process or to a statutory Dragonetti claim[12] from its base in defamation law, and its occasional application to malpractice actions against negligent experts, the federal courts below thus took a bold step in extending Pennsylvania law. And since the actions for abuse of process and malicious use of process can only be predicated on verbal actions taken in court proceedings, applying the privilege would almost wholly negate those state law causes of action. In doing so, the courts below placed too much weight on a few opinions of an intermediate state appellate court (none on point) and too little on the consistent note of caution expressed by the state supreme court.

In dismissing petitioner's complaint, the district court and Third Circuit in this case failed to exercise the caution that a federal court should embrace when confronting a question of state law that the state supreme court has consistently declined to address. Petitioner recognizes, of course, that this Court normally defers to the views of the local federal

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[11] The holding in that case was that a state claim for abuse of process was preempted by the federal Bankruptcy Code when predicated on litigation conduct in U.S. Bankruptcy Court.

[12] The nature and purpose of the "Dragonetti Act" is discussed by the Pennsylvania Supreme Court in Stone Crushed Partnership, 589 Pa. at 299, 908 A.2d at 877 n.1.

courts on the proper construction and application of state law. Haring v. Prosise, 462 U.S. 306, 314 n.8 (1983); Bishop v. Wood, 426 U.S. 341, 345-46 (1976); Helvering v. Stuart, 317 U.S. 154, 162-63 (1942). Such cases do come within this Court's certiorari jurisdiction, however (as they come within the diversity jurisdiction of the lower federal courts); accordingly, there are necessarily exceptions to the general hands-off rule.[13]

First and foremost, this Court has held, deference is limited to constructions of state law which are "reasonable." Haring, id. This Court will not defer to an "unreasonable" interpretation of state law by the lower federal courts. Propper v. Clark, 337 U.S. 472, 487 (1949). Nor will it accept a decision applying state law by the courts below that is "clearly wrong," The Tungus v. Skovgaard, 358 U.S. 588, 596 (1959), or "clearly erroneous," United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960). Rather, upon

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[13] In this case, the New Jersey district judge (with less than two years' judicial experience) sat by designation in the Eastern District of Pennsylvania, and so was not someone would could be presumed to be versed in Pennsylvania law; moreover, her prior practice experience was entirely federal. Compare Bishop v. Wood, 426 U.S. at 345 ("We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years."); accord MacGregor v. State Mutual Life Assur. Co., 315 U.S. 280, 281 (1942) (per curiam) ("the interpretation placed upon purely local law by a Michigan federal judge of long experience"). Likewise, the court of appeals decision was rendered by a panel that included only one Pennsylvania jurist (who was not the authoring judge).

"a plain showing of error," Palmer v. Hoffman, 318 U.S. 109, 118 (1943), or a "definite conviction of error," Helvering v. Stuart, 317 U.S. 154, 163 (1942), the lower courts' decision can be set aside. Thus, "[o]n occasion, ... the Court has refused to follow the views of a lower federal court on an issue of state law." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 n.9 (1985), citing Cole v. Richardson, 405 U.S. 676, 683-84 (1972). See also California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam). This is another case of that kind. The Court should grant certiorari to discuss the circumstances in which it will override an erroneous and unduly adventuresome interpretation of state law.

On the one hand, petitioner recognizes that a federal court sitting in diversity cannot decline to address an essential question of state law simply because there is no controlling authority of the state supreme court. Propper v. Clark, 337 U.S. at 486-90; Meredith v. Winter Haven, 320 U.S. 228, 234 (1943).[14] But the federal courts should exercise more caution in blazing a new trial than the Third Circuit

[14] As discussed above, the intermediate state courts have not actually declared and consistently applied a rule applying the judicial privilege doctrine to Pennsylvania actions for abuse of process, so as to arguably entitle their decisions to more authoritative weight in a federal case. Compare West v. AT&T, 311 U.S. 223, 236-37 (1940), with Comm'r of Int. Rev. v. Estate of Bosch, 387 U.S. 456 (1967).

or district court did here.[15]

Other Circuits have shown more restraint and expressed the appropriateness of demonstrating judicial modesty in this context. In Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1569-70 (6th Cir. 1985), for example, the Sixth Circuit recognized that a federal judge's view of public policy was not a proper ground for limiting or extending a state law rule of decision. Similarly, in Hollander v. Brown, 457 F.3d 688 (7th Cir. 2006), the Seventh Circuit refused to depart from Illinois' interpretation of its statute of limitations to allow a sympathetic but belated claim for injuries due to a rape that allegedly occurred some 17 years before the suit was filed.

As expressed by the Fifth Circuit, sitting en banc:

> As a federal court, 'it is not for us to adopt innovative theories of [state law] but simply to apply that law as it currently exists' .... We are emphatically not permitted to do merely what we think best; we must do that which we think the Mississippi Supreme Court would deem best. ... The privilege (or duty) of changing the law belongs to the Mississippi courts or legislature.

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[15] This petition does not concern a case where the particular doubtful question has been decided by a state court at an earlier stage of the same case. In that event, the federal court can be bound even by a lower state court's ruling, once it becomes final. Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 729-30 (1988).

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 397 (5th Cir. 1986) (insertion and emphasis original; internal citations omitted).

In dismissing petitioner's complaint on the basis of an extension rather than an application of existing Pennsylvania law, the federal courts below exceeded their proper role in exercising diversity jurisdiction. The result was a termination of petitioner's effort to secure justice for the wrongs done to him, including the substantial reputational and consequent financial losses he suffered, as a result of his exercising independent and courageous judgment as an arbitrator in a contentious and controversial case. To correct this deviation from the proper limits of federal judicial authority, certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner EDWIN E. NAYTHONS prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming dismissal of his lawsuit against the respondents.

Respectfully submitted,

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December 22, 2009

APPENDIX A

Only the Westlaw citation is currently available.
2009 WL 2329915
Not for Publication in West's Federal Reporter

United States Court of Appeals, Third Circuit.
Edwin E. NAYTHONS, Appellant
v.
STRADLEY, RONAN [sic], STEVENS & YOUNG LLP and Andre L. Dennis, Esq.
No. 08-2527.

Submitted Under Third Circuit L.A.R. 34.1(a)
on July 14, 2009.
Filed July 30, 2009.

Background: Arbitrator in litigation between a church member and church leaders brought action against law firm that represented the church leaders in the arbitration, alleging common law abuse of process and wrongful use of civil process due to the "scorched earth" litigation strategy the law firm employed and the accusations the law firm leveled against him in the course of making arguments for his recusal. The United States District Court for the Eastern District of Pennsylvania, Renee M. Bumb, J., 2008 WL 1914750, dismissed the complaint. Arbitrator appealed.

Holding: The Court of Appeals, Fuentes, Circuit Judge, held that arbitrator could not assert common law abuse of process or wrongful use of civil process against law firm.

Affirmed.

Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania,

(D.C.Civ. No. 07-cv-04489), District Judge: Honorable Renee M. Bumb.[1]

George A. Bochetto, Esq., David P. Heim, Esq., Bochetto & Lentz, Philadelphia, PA, for Appellant.
Joseph C. Crawford, Esq., Andrea Toy Ohta, Esq., Pepper Hamilton, Philadelphia, PA, for Stradley, Ronon, Stevens & Young LLP and Andre L. Dennis, Esq.

Before RENDELL, FUENTES, and ROTH, Circuit Judges.

OPINION

FUENTES, Circuit Judge:

*1 Edwin E. Naythons appeals from the District Court's dismissal of his complaint against the law firm of Stradley, Ronan, Stevens, and Young, LLP and Andre L. Dennis, Esq. ("Stradley"). Naythons alleges one count of common law abuse of process and one count claiming wrongful use of civil process. For the reasons stated below, we will affirm.[2]

I. Facts and Procedural History
Because we write exclusively for the parties, we only discuss the facts and proceedings to the extent necessary for resolution of this case.

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[1] Honorable Renee M. Bumb, District Judge for the United States District Court for the District of New Jersey, sitting by designation.

[2] The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

The underlying litigation in this case began in 1995 when Anthony Patterson, a member of the Church of the Lord Jesus Christ of the Apostolic Faith in Philadelphia, filed an action in state court against church leaders alleging that they had looted millions of dollars from the church's bank accounts. In November 2006, the parties agreed to submit the case to binding arbitration. The parties selected Edward Naythons ("Naythons"), a retired United States Magistrate Judge in the Eastern District of Pennsylvania, as the neutral arbitrator. The arbitration concluded in April 2006, and Naythons found against the church leaders. Naythons ordered a full accounting of the missing funds. After the accounting was completed, Naythons worked on the written, final adjudication until July 25, 2006. However, on July 27, 2006, before Naythons filed the final adjudication, he received an anonymous "threat" via an online social networking site. Naythons informed the parties of the threat on August 3, 2006, at which time the defendants in the underlying action urged Naythons to recuse himself for fear that the threat would result in bias against them. Naythons declined to do so. Thereafter, the defendants in the underlying action, represented by Stradley and other law firms, began to aggressively pursue Naythons's recusal in the state court proceeding. For the purposes of this litigation, the most important filing was Stradley's petition to recuse Naythons based on bias, misconduct, dishonesty, and fraud.

Naythons issued the final adjudication in October 2006, but dated it July 25, 2006, the date he completed it. In November 2006, Stradley filed a

motion to vacate the final arbitration award. In December 2006, Stradley filed a petition for a hearing on their petition to vacate, as well as their previous petition for recusal.

About ten months later, Naythons filed a complaint against Stradley. In it, Naythons alleged abuse of process and wrongful use of civil proceedings due to the "scorched earth" litigation strategy Stradley employed and the accusations Stradley leveled against Naythons in the course of making arguments for his recusal. Stradley moved to dismiss the case because Naythons, a non-party to the underlying litigation, lacked standing. After hearing oral argument, the District Court granted Stradley's motion to dismiss. Specifically, the District Court found that there was no authority under Pennsylvania law to support Naythons' position, and that Naythons lacked standing to pursue his claims. The District Court also found that the doctrine of judicial privilege protects attorneys, arbitrators and judges from these types of claims, and that if courts abrogated the doctrine in the way Naythons advocates, it would "chill zealous advocacy." The District Court also held that Naythons could not demonstrate harm as a result of the alleged "abuse of process."

II. Discussion[3]

*2 Under Pennsylvania law, "abuse of process is

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[3] We exercise plenary review of the District Court's order granting Stradley's motion to dismiss. *United States Dept. of Transp., ex. rel. Arnold v. CMC Eng'g, et al.*, 564 F.3d 673, 676 (3d Cir.2009).

defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed." *Cruz v. Princeton Ins. Co.*, 972 A.3d 14, 15 n. 1 (Pa.Super.Ct.2009) (citations omitted). To establish a claim for abuse of process the plaintiff must show that the defendant "(1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff." *Id.* Abuse of process is, in essence, the use of legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process. *Id.* (citing *McGee v. Feege*, 517 Pa. 247, 535 A.2d 1020, 1026 (Pa.1987)). Although substantially similar to a claim of abuse of process, a claim of "wrongful use of civil proceedings" incorporates an additional causation element: the defendant did not have probable cause for his action. *Id.* at 19 n. 5, 535 A.2d 1020.

Under Pennsylvania law, the District Court correctly dismissed Naythons's claims of abuse of process and wrongful use of civil proceedings. Stradley did not "use legal process" against Naythons.[4] Naythons was the arbitrator in the state proceeding, not a party to the action, and the fact that he was named as a respondent in one of the state court petitions is of no import. Permitting Naythons to sustain either of these claims against Stradley would abrogate the doctrine of judicial privilege, whereby "pertinent and

[4] We note that the District Court based its decision, in part, on the fact that Stradley was not the law firm that initially listed Naythons as a respondent in the state court petition at issue in this case.

material" communications made in in the context of judicial proceedings are absolutely privileged from civil liability. *Moses v. McWilliams,* 379 Pa.Super. 150, 549 A.2d 950, 956 (Pa. Super. Ct.1988) (citing *Post v. Mendel,* 510 Pa. 213, 507 A.2d 351, 355 (Pa.1986)). The proper recourse for any unethical conduct on behalf of Stradley is through judicial review of the arbitration proceedings, which could result in sanctions against Stradley if their conduct was as egregious as Naythons alleged in his complaint.[5]

III. Conclusion

For the foregoing reasons, we will affirm the District Court's dismissal of Naythons's complaint.

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[5] Because we find the issue of judicial privilege so overarching in this matter, we do not reach the alternative bases for the District Court's decision.

APPENDIX B

Only the Westlaw citation is currently available.
2008 WL 1914750

United States District Court,
E.D. Pennsylvania.

The Honorable Edwin E. NAYTHONS, Plaintiff,
v.
STRADLEY, RONON, STEVENS & YOUNG, LLP,
and Andre L. Dennis, Defendants.

Civil No. 07-4489 (RMB).
Docket Entry No. 6.

April 30, 2008.

George Bochetto, Bochetto & Lentz PC, Philadelphia, PA, for Plaintiff.
Joseph C. Crawford, Pepper Hamilton LLP, Philadelphia, PA, for Defendants.

OPINION

BUMB, District Judge.

I. INTRODUCTION

*1 This matter comes before the Court upon Defendants' motion to dismiss Plaintiff's Complaint for failure to state a claim. Plaintiff is the Honorable Edwin E. Naythons, a retired United States Magistrate Judge, who served as a private arbitrator in the litigation underlying this matter. Defendants are the law firm of Stradley, Ronon, Stevens & Young, LLP ("Stradley") and Andre Dennis, Esq. ("Dennis"), who represented one of the parties in the underlying litigation.

Plaintiff has filed the present action alleging that Defendants abused the legal process by filing petitions seeking the recusal of Plaintiff as arbitrator and vacatur of Plaintiff's arbitration decision. The two-count Complaint contains a common law claim for abuse of process and a claim under the Pennsylvania Dragonetti Act for wrongful use of civil process. Defendants now move to dismiss the Complaint for failure to state a legally cognizable claim.

II. FACTS

The facts of the lawsuit underlying this matter are complicated and contested, but the details do not affect the issues presented in this particular case and/or motion. Accordingly, the Court will briefly summarize the facts that are relevant to this motion and necessary to understand the procedural context of this matter.[1]

The underlying litigation first began in July 1995, when Anthony Patterson, a member of the Church of the Lord Jesus Christ of the Apostolic Faith (the "Church"), filed an action against Bishop Shelton and Eric Shelton, leaders of the Church, alleging that they had looted the Church's bank accounts and stolen millions of dollars. (Pl. Opp. at 4). On November 30, 2006, after more than a decade of litigation in the Philadelphia Court of Common Pleas, the parties agreed to submit the case to

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[1] The facts are taken from Plaintiff's Opposition and set forth in a light most favorable to Plaintiff.

private, binding arbitration. (*Id.*) Pursuant to the arbitration agreement, each side selected three arbitrators who would hear the evidence and decide the case. (*Id.*). The parties further agreed that the arbitration would be conducted by a neutral arbitrator, who would control the proceedings as a judge and also serve as the ultimate decision-maker if a majority decision could not be reached. (*Id.*). Plaintiff was selected to serve as the neutral arbitrator. (*Id.* at 5).

The arbitration hearing concluded on April 3, 2006, but after two deliberative sessions, the six arbitrators were unable to reach a majority decision. (*Id.*). Consequently, the decision was left to Plaintiff and on April 26, 2006, he issued his initial adjudication. (*Id.*). He found against Bishop Shelton and called for an accounting of the removed funds.[2] (*Id.*). After the ordered accounting was completed, Plaintiff worked on a final adjudication until July 27, 2006.[3] (*Id.* at 10).

However, on July 27, 2006, before the entry of his final decision, Plaintiff learned of a death threat that had been made against him anonymously. (*Id.*). Plaintiff held a conference with the parties on August 3, 2006, to discuss the concerns surrounding the threat. (*Id.* at 14). Defendants urged Plaintiff to

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[2] Defendants challenged Plaintiff's initial adjudication, but on July 10, 2006, Judge Dych of the Court of Common Pleas upheld Plaintiff's decision. (*Id.* at 8).

[3] Plaintiff added an insert to his opinion on or before August 2, 2006, which did not alter any of the essential findings. (*Id.* at 12-13).

recuse himself because of the threat, but Plaintiff declined to do so. (*Id.* at 15).

*2 Thereafter, Defendants filed a Petition for Recusal on August 16, 2006 in the Orphans' Division of the Court of Common Pleas (the "Orphans' Court"), accusing Plaintiff of, *inter alia*, bias. (*Id.* at 16). Plaintiff hired counsel to oppose the recusal effort and submitted a response opposing the petition. (*Id.* at 17). In response to Plaintiff's opposition, Defendant Dennis wrote a letter to the Orphans' Court, arguing that Plaintiff was not a party to the proceedings, despite having been named as a "respondent" in another filing in the Orphans' Court and listed as a "party in interest" to the Petition for Recusal. (*Id.*). The Orphans' Court agreed with Dennis' argument and struck Plaintiff's response from the record. (*Id.*).

Plaintiff issued his final adjudication on October 3, 2006, but dated it July 25, 2006, the date he had originally written it. (*Id.* at 18). On November 2, 2006, Defendants filed a Petition to Vacate the final arbitration award. (*Id.* at 19). Additionally, on December 21, 2006, Defendants filed a Petition for a Hearing on their Petition to Vacate as well as their previous Petition for Recusal. (*Id.* at 20). Defendants' Petition for Recusal and Petition to Vacate are the filings that Plaintiff has taken issue with; they constitute the basis for Plaintiff's current Complaint.[4]

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[4] Plaintiff also lists a number of petitions and motions that were filed by other parties aligned with Bishop Shelton. (Pl. Opp. at 19-12). However, the only filings relevant to this matter are those filed by Defendants.

III. STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted must be denied if the plaintiff's factual allegations are "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly,* --- U.S. ----, ----, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007) (internal citations omitted). Moreover, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations omitted).

A district court must accept any and all reasonable inferences derived from those facts. *Unger v. Nat'l Residents Matching Program,* 928 F.2d 1392 (3d Cir.1991); *Glenside West Corp. v. Exxon Co., U.S.A.,* 761 F.Supp. 1100, 1107 (D.N.J.1991); *Gutman v. Howard Sav. Bank,* 748 F.Supp. 254, 260 (D.N.J.1990). Further, the court must view all allegations in the Complaint in the light most favorable to the plaintiff. *See Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1261 (3d Cir.1994).

Therefore, in deciding a motion to dismiss, a court should look to the face of the complaint and decide whether, taking all the allegations of fact as true and construing them in a light most favorable to the

nonmovant, plaintiff has alleged "enough facts to state a claim for relief that is plausible on its face." *Twombly,* 127 S.Ct. at 1974. Only the allegations in the complaint, matters of public record, orders, and exhibits attached to the complaint matter, are taken into consideration. *Chester County Intermediate Unit v. Pennsylvania Blue Shield,* 896 F.2d 808, 812 (3d Cir.1990).

IV. DISCUSSION

A. Abuse of Process Claim (Count I)

*3 As explained by the Pennsylvania Supreme Court, "[t]he gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it[.]" *McGee v. Feege,* 517 Pa. 247, 253, 535 A.2d 1020 (1987). To state a claim for abuse of process under Pennsylvania law, a plaintiff must allege that "the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff." *Hart v. O'Malley,* 436 Pa.Super. 151, 647 A.2d 542, 551 (Pa.Super.Ct.1994) (quoting *Rosen v. American Bank of Rolla,* 426 Pa.Super. 376, 627 A.2d 190, 192 (Pa.Super.Ct.1993)) (internal quotations omitted). In their motion to dismiss, Defendants argue that Plaintiff has failed to satisfy any of these elements.

1. Legal Process Used Against Plaintiff

Defendants assert that Plaintiff lacks standing to bring an abuse of process claim because he was not a party to the underlying civil proceedings and, thus, legal process was not used *against* him. (Def. Motion at 21). Specifically, Defendants argue that their petitions to vacate the arbitration ruling and to recuse Plaintiff were not directed at Plaintiff but

sought to challenge Plaintiff's decisions. (*Id.* at 22, 627 A.2d 190). Defendants contend that these petitions "imposed no obligation on Arbitrator Naythons to respond" and cite the September 20, 2006 decree of the Orphans' Court Division of the Court of Common Please of Philadelphia, in which Judge Herron struck Plaintiff's responsive pleadings, stating that "as an arbitrator who served in a quasi-judicial capacity, he is not a party in the proceedings." (*Id.* at 22-23, 627 A.2d 190; Ex. 1).

In response, Plaintiff makes two arguments. First, he asserts that he was in fact "named as a party-respondent in the Orphans' Court, and Defendants listed him as a 'party in interest' on their Petition for Recusal." (Pl. Opp. at 30). Second, Plaintiff argues that he has standing by virtue of the aggrievement he suffered as a result of Defendants' allegations of fraud and misconduct. (*Id.*). Thus, according to Plaintiff's argument, even if Plaintiff was not an actual named party in the underlying civil proceedings, he still has standing for his present abuse of process claim because Defendants' petitions were "aimed" at Plaintiff and "intended to have a direct and immediate impact" on him. (*Id.* at 32, 35, 627 A.2d 190).

As to Plaintiff's first argument, the petition that actually listed Plaintiff as a "respondent" was *not* filed by Defendants in this action, Stradley, on behalf of Bishop Shelton, but by Blank Rome on behalf of the General Assembly of the Church. (*See* Pl. Opp., Ex. 2 at 2). Although Plaintiff argues that because the Stradley Defendants filed their petitions "under the same Orphans' Court docket number" they effectively named Plaintiff as a party (*see* Pl. Opp. at

34, n. 7), such argument ignores the essence of this first element - that *the defendant used* a legal process *against the plaintiff.* The facts that Defendants filed their petitions under the Trustees' docket number and listed Plaintiff among "other parties" on their civil cover sheet are irrelevant to the question and only serve to muddy the waters. Thus, Plaintiff's first argument has no merit.

*4 Concerning Plaintiff's second argument - that Defendants' petitions were "aimed" at Plaintiff, the law is clear that the legal process invoked by Defendants must have been used "against" Plaintiff. *Hart,* 647 A.2d at 551. While Plaintiff is correct that this requirement has been softened to allow others who were not officially named as parties in the underlying suit to bring claims of abuse of process, the cases Plaintiff relies on are readily distinguishable from the current situation.

In *Cruz v. Princeton Ins. Co.,* 925 A.2d 853 (Pa.Super.2007), the court allowed the parents of a minor to file an abuse of process action despite the fact that they were not parties to the underlying medical malpractice action. The court explained that "the petition's undeniable aim was the removal of [the parents] as [the minor's] guardians" and, thus, the parents were "the legal object of the petition." *Id.* at 857. This Court finds a petition to remove parents as guardians of a minor very different from a petition to recuse an arbitrator or to vacate his decision. Despite Plaintiff's characterization that the parents in *Cruz* were "involved in resolving a dispute between parties to the litigation[,]" the parents did not play the role of decision-maker in that case. Here, Plaintiff was the decision-maker and the

petition sought judicial review of his decision.

Similarly, in *Sands v. Living Word Fellowship*, 34 P.3d 955 (Ala.2001), the court held that a parishioner of a church had standing to bring an abuse of process claim notwithstanding his absence as a party in the underlying proceeding. In the underlying action, parents of a minor had obtained an injunction that prohibited members of the church from having contact with the minor. The court held that because the parishioner was a "member" of the church, the injunction enjoined his conduct and, thus, the underlying proceeding had a direct impact on him even though he was not formally a party. (Pl. Opp. at 33). Thus, the *Sands* case is distinguishable from the present one in that the plaintiff did not serve as the judge in the underlying suit, unlike Plaintiff Naythons. The third case cited by Plaintiff, *Bd. of Ed. v. Farmingdale Teachers Ass'n, Inc.*, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), is inapplicable for the same reason.

At oral argument, counsel for Plaintiff candidly acknowledged the dearth of case law in support of his position that an arbitrator has standing to bring a claim for abuse of process. In fact, counsel urged this Court to be "the first" to allow arbitrators whose reputations have been besmirched by unfounded allegations of fraud and misconduct the opportunity for vindication.[5] Because the doctrine of judicial

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[5] Similarly, in his brief, counsel characterized this case as "an ideal opportunity to send a firm message to the Bar about the line which separates permissible zealous advocacy on the one hand, and abuse of the judicial system through

privilege precludes Plaintiff from bringing a claim for defamation, counsel argued, Plaintiff has no alternative means of remedying the alleged wrong committed by Defendants.[6]

Although evocative, counsel's argument does not persuade this Court to expand the abuse of process claim to reach the Plaintiff here. Aside from the lack of supportive authority directly on point, Plaintiff fails to acknowledge that the system of judicial review is designed, in part, to serve as a means of protection for arbitrators and judges alike. On appeal of Plaintiff's arbitration decision, if the reviewing court finds that Defendants did indeed overstep their bounds by making baseless allegations of fraud and misconduct, Plaintiff will likely be vindicated by that court's decision rejecting Defendants' contentions.[7] Beyond this declaratory vindication, the reviewing court also has the power to sanction Defendants or hold them in contempt as appropriate. *See, e.g., Binder v. Triangle Pub., Inc.*, 442 Pa. 319, 324, 275 A.2d 53 (1971) (noting that judicial privilege exists in part because "courts have other internal sanctions against defamatory

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'scorched earth' litigation tactics on the other." (Pl. Opp. at 1).

[6] Counsel rejected the Court's suggestion that enforcement of the Professional Rules of Conduct would provide effective redress, arguing that such remedy is not public and, thus, cannot compensate for the damage done to Plaintiff's reputation.

[7] The Court acknowledges counsel's argument that at times this judicial review may not be adequate where, for example, the reviewing court, for whatever reason, does not reach the issue.

statements, such as perjury or contempt proceedings").

*5 Moreover, this Court finds that the rationale underlying the long-standing doctrine of judicial privilege weighs against counsel's novel argument. Under the doctrine of judicial privilege, "statements made by judges, attorneys, witnesses and parties *in the course of or pertinent to any stage of judicial proceedings* are absolutely privileged and, therefore, cannot form the basis for liability for defamation." *Pawlowski v. Smorto,* 403 Pa.Super. 71, 588 A.2d 36, 41 (Pa.Super.1991) (emphasis added) (citing *Binder,* 442 Pa. 319, 275 A.2d 53; *Post v. Mendel,* 510 a. 213 (1986); *Triester v. 191 Tenants Ass'n,* 272 Pa.Super. 271, 415 A.2d 698 (Pa.Super.1979)). As the Pennsylvania Supreme court explained,

> [t]he reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. *The privilege is also extended* to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and *to counsel to enable him to best represent his client's interests.*

Binder, 442 Pa. at 323-24, 275 A.2d 53 (emphasis added).

Thus, the judicial privilege affords counsel immunity from liability so that he may zealously advocate on his client's behalf without exposing himself to potential defamation claims. The same rationale applies to this case, where the liability is not based in defamation but in abuse of process. In this Court's

view, were Plaintiff allowed to proceed in his claim for abuse of process, the effect would be a circumvention of the doctrine of judicial privilege and, ultimately, a chilling of zealous advocacy.

Given the lack of authority to support Plaintiff's position, the inherent protection afforded by the system of judicial review, and the underlying rationale of the judicial privilege, which this Court finds applicable in the abuse of process context, this Court holds that Plaintiff does not have standing to pursue his abuse of process claim.

2. Perversion of Process

Even if Plaintiff did have standing to bring an abuse of process claim, Defendants argue that Plaintiff has failed to show that Defendants perverted a legal process. Specifically, Defendants assert that by filing their petitions, they were not "perverting" any process but "pursuing a permissible, legitimate use of the process, which was to seek judicial review and persuade a reviewing court to overturn and vacate Arbitrator Naythons' recusal decision and adjudication." (Def. Motion at 24-25). Plaintiff counters by arguing that Defendants "engaged in a 'scorched-earth' litigation campaign for the *improper* purpose[s] of delaying the enforcement of binding and valid arbitration awards [,]" "allowing Defendants' client ... to retain control of the Church[,]" and "aggrandizing themselves with the billing and receipt of enormous legal fees ..." (Pl. Opp. at 36).

***6** With regards to the "perversion of process" element, Pennsylvania courts have held that there must be "[s]ome definite act or threat not authorized

by the process, or aimed at an objective not legitimate in the use of the process." *Hart*, 647 A.2d at 170-71 (quoting *Shaffer v. Stewart*, 326 Pa.Super. 135, 473 A.2d 1017, 1019 (Pa.Super.Ct.1984)). Furthermore, "*there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.*" *Id.* (emphasis supplied). As the Third Circuit held, "the point of liability is reached when the utilization of the procedure for the purpose for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable litigation procedure." *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 308 (3d Cir.2003) (internal quotations and citation omitted).

Here, the "processes" at issue are Defendants' petitions to recuse Plaintiff and vacate Plaintiff's arbitration decision. To constitute a "perversion" of these processes, Defendants must have had some purpose other than seeking the recusal of Plaintiff or a review of his decision. Plaintiff's allegations, however, accuse Defendants of engaging in an onslaught of filings and seeking to overturn the arbitration decision. Such allegations do not amount to a "perversion" of process.

As an initial matter, the Court notes that Defendants were not responsible for the majority of the filings Plaintiff refers to in his opposition. (*See* Pl. Opp. at 19-21).[8] Defendants in this case cannot be

[8] Although the list of filings in Plaintiff's opposition is not entirely clear, it appears that Defendants are actually responsible for four substantive filings (in two separate

charged for the barrage of other parties' filings. Even if Defendants had filed numerous petitions, there is a legal distinction between a claim of improperly initiating a process and a claim of abusing a process *after* it was initiated. *See, e.g., Cameron v. Graphic Mgmt. Assoc., Inc.*, 817 F.Supp. 19, 21, 22 (E.D.Pa.1992). Accordingly, Plaintiffs allegation that Defendants engaged in a "scorched-earth" litigation tactic cannot support a claim for abuse of process.[9]

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actions): 1) Petition for Recusal, dated August 16, 2006; 2) Petition for a Citation to Show Cause why the Orphans' Court should not Vacate or Set Aside the "Final Adjudication and Decree", dated November 2, 2006; 3) Appeal of Judge Dych's Order, dated July 26, 2006; and 4) Motion to Set Aside Arbitration Award, dated November 2, 2006. (Pl. Opp. at 19-21).

[9] The Court finds that the cases Plaintiff relies on to support the notion that certain litigation tactics may constitute perversion of process are distinguishable from the present one. For example, in *General Refractories*, the plaintiff alleged that the underlying litigation was used for the improper purpose of harassment and avoiding a party's right to recover by delaying the litigation and the Third Circuit held that such allegations "could, if severe enough, constitute perversion of the legal process." *General Refractories*, 337 F.3d at 308. By contrast, Plaintiff here does not allege that Defendants instituted litigation tactics to "harass" him or "avoid his right to recover." For similar reasons, *McGee v. Feege*, 517 Pa. 247, 535 A.2d 1020 (1987), and *Shiner v. Moriarty*, 706 A.2d 1128 (Pa.Super.1998), are also distinguishable.

Additionally, the Court notes that the cases Plaintiff cites discussing the courts' unwillingness to tolerate scorched earth litigation tactics do not involve claims for abuse of process. Rather, they all discuss Rule 11 sanctions as the appropriate response to such litigation tactics. *See, e.g., Grider v. Keystone Health Plan Center, Inc.*, 2007 WL 2874408 at *34 (E.D.Pa.2007); *In re Armstrong*, 2001 WL

Moreover, Defendants' desire to seek judicial review of Plaintiff's arbitration decision is a legitimate use of process - indeed, it is *the* purpose of the appeal process. As stated above, even if Defendants had "bad intentions" in seeking an appeal of Plaintiff's decision, this still would not constitute a "perversion" of process. See, *Hart,* 647 A.2d at 170-71 ("there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions").

For these reasons, Plaintiff has failed to show a perversion of process sufficient to state a claim of abuse of process.

3. Harm Caused to Plaintiff

Defendants argue that Plaintiff has not satisfied the third element of an abuse of process claim because he has failed to show that Defendants' filing of petitions caused him harm. *See Hart,* 647 A.2d at 551. Although the Complaint alleges that Plaintiff has suffered damage to his reputation, emotional harm, and a loss of earnings, Defendants dismiss these claims as "speculative harm [that] should not be recognized as a basis for the abuse of process tort." (Def. Motion at 27). Defendants contend that "[w]hen a person agrees to serve as a [sic] arbitrator,

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799705 at *4 (E.D.Pa.2001); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 84 (D.N.J.2006); *St. Germain v. Ross,* 2007 WL 347852 (Conn.Super.2007) (noting that "[i]f a litigant has a history of filing vexatious, harassing or duplicative lawsuits, courts may impose sanctions, including restrictions on future access to the judicial system") (internal quotations and citations omitted).

he implicitly agrees that his decisions in the arbitration may be subject to judicial review in light of the prevailing legal standards." (*Id.*). Additionally, Defendants characterize Plaintiff's allegations of harm as "thinly veiled attempts to portray the statements in the petitions as defamatory." (*Id.* at 28, 647 A.2d 542). Thus, Defendants argue, Plaintiff's alleged harm is nothing more than an attempt to circumvent the judicial privilege doctrine, which precludes the imposition of defamation liability on counsel for statements made in connection with judicial proceedings.

*7 Contrary to Defendant's contentions, this Court finds that Plaintiff has made sufficient allegations of real harm - reputational, emotional, and financial harm. Defendants cite no authority to support their argument that such harm is "speculative and should not be recognized as a basis for the abuse of process tort." (*Id.* at 27, 647 A.2d 542). Indeed, this Court (and others across the country) find quite the opposite to be true.[10] Although reputational damage may be difficult to quantify, it is not speculative where Plaintiff's career as a private arbitrator depends largely (if not entirely) on having a good reputation as a fair and honest judge. Plaintiff's claims of economic loss are directly related to his alleged loss of business as an arbitrator. Moreover,

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[10] *See, e.g., Seltzer v. Morton*, 336 Mont. 225, 267, 154 P.3d 561 (Mont.2007) (upholding jury award of $1.1 million in compensatory damages for abuse of process and malicious prosecution where plaintiff presented evidence that "he suffered serious damage to his personal and professional reputation; and that he suffered serious and severe emotional distress").

while Defendants may be correct that the risk of facing allegations of fraud and misconduct is one of the "occupational hazards" of being an arbitrator, this does not mean that Plaintiff has suffered no harm as a result of Defendants' allegations.

The Court also rejects Defendants' argument that Plaintiff should not be entitled to recover for the harms he suffered because the same damages are recoverable in a defamation claim, which is precluded here under the doctrine of judicial privilege. Although the Court finds the rationale underlying the judicial privilege persuasive as to the standing issue (as discussed above), it does not follow that the doctrine precludes non-defamation claims that allow for similar damages. The judicial privilege concerns liability for defamatory acts, not the consequences that stem from those acts.

If Plaintiff had standing to bring an abuse of process claim and alleged a perversion of process, he would be entitled to damages for the reputational, emotional, and financial harm he suffered. However, the harm Plaintiff has suffered does not overcome his lack of standing nor his failure to allege a perversion of process. This Court is certainly sympathetic to Plaintiff's allegations of harm and his circumstances, but the law does not afford Plaintiff relief under this claim. Thus, Plaintiff's abuse of process claim fails and Defendants are entitled to dismissal of that claim.

B. Wrongful Use of Civil Process (Count II)

Count II of Plaintiff's Complaint is a claim for wrongful use of civil proceedings under the Pennsylvania Dragonetti Act, 42 Pa.C.S.A. § 8351.

To state a claim under this Act, a plaintiff must allege three elements:

> 1) that the underlying proceedings were terminated in their favor; 2) that defendants caused those proceedings to be instituted against plaintiffs without probable cause; and 3) that the proceedings were instituted primarily for an improper cause.

Hart, 647 A.2d at 547 (internal citations omitted). Defendants argue that Plaintiff has not only failed to satisfy any of these elements, but that he also lacks standing to bring a wrongful use of civil process claim. (Def. Motion at 14).

1. Standing

*8 Similar to their argument concerning Plaintiff's abuse of process claim, Defendants assert that Plaintiff does not have standing to bring a claim for wrongful use of civil process because he was not a party in the underlying civil action. As the *Hart* court explained, "[c]ase law has consistently stated, in a variety of circumstances, that an action under 42 Pa.C.S.A. § 8351 for wrongful use of civil proceedings cannot be maintained by one who is not an original party to the underlying action"). *Hart*, 647 A.2d at 549; *see also Rosen v. Am. Bank of Rolla*, 426 Pa.Super. 376, 627 A.2d 190, 193 (Pa. Super. Ct.1993); *Pawlowski v. Smorto*, 403 Pa.Super. 71, 588 A.2d 36, 39 (Pa.Super.Ct.1991).

Plaintiff disputes that he was not named a party to the action, citing the Petition for Citation filed by the Trustees of the Church on August 3, 2006, which refers to Plaintiff as "Respondent." (Pl. Opp. at 49). Plaintiff also points out that, subsequent to the Trustees' filing, Defendant Dennis sent a letter to

Plaintiff requesting that Plaintiff recuse himself and noting "[y]ou [Plaintiff] are now a named respondent in the Orphans' Court action ..." (*Id.*).

As discussed above in the standing analysis for the abuse of process claim, this Court rejects Plaintiff's argument that the Stradley Defendants named Plaintiff as a party simply because they filed their petitions under the same Orphans' Court docket number as the Trustee's petition, which listed Plaintiff as a respondent. Plaintiff was not an original party to the actions filed by the Stradley Defendants and, thus, lacks standing to bring a wrongful use of process action.

2. Elements of Wrongful Use of Civil Process Claim

Beyond the standing problem, Defendants argue that Plaintiff has failed to satisfy the three elements necessary to state a claim for wrongful use of civil proceedings. First, because Plaintiff was not a party to the underlying proceedings, it cannot be said that such proceedings terminated in Plaintiff's favor. While Plaintiff argues that "the Orphans' Court action - as it related to Judge Naythons as a party" was terminated in his favor, (Pl. Opp. at 52), as discussed above, that action was not filed by these Defendants and is not the action underlying this claim for wrongful use of civil proceedings. Thus, Defendants are correct that Plaintiff fails to meet the first element.[11]

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[11] To the extent Plaintiff argues that Defendants' defense of Bishop Shelton provides a basis for his claim under the Dragonetti Act, courts in the Third Circuit have rejected this argument. *See Walasavage v. Nationwide Ins. Co.*, 633

Second, Defendants repeat their argument that they did not initiate a civil proceeding *against* Plaintiff. As explained above in the abuse of process analysis, this Court agrees.

Third, Defendants assert that they had probable cause to file the petitions seeking Plaintiff's recusal and an order vacating his arbitration decision. Defendants contend that they "reasonably believe[d] in the existence of the facts upon which [their petitions for recusal and vacatur] [were] based[,]" as required under Pennsylvania law. (Def. Motion at 19 (citing 42 Pa.C.S.A. § 8352)). To support their claim of probable cause, Defendants allege that, 1) Plaintiff "was biased and prejudiced because he baselessly assumed that Bishop Shelton or his supporters were associated with the [death] threats, which he learned of through an ex parte communication by opposing counsel"; 2) Plaintiff "misrepresent[ed] that he completed his Final Adjudication and Decree before learning of the threats"; and 3) there "were significant irregularities" in the arbitration, including Plaintiff's "disregard of the other four

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F.Supp. 378, 380 (E.D.Pa.1986), *aff'd*, 806 F.2d 465, 467 (3d Cir.1986) ("allowing individuals to be sued under this [Dragonetti] act for defending prior actions, would place a considerable burden on the courts by creating a never ending progression of litigation as well as having a chilling effect upon an individual's ability or willingness to defend a suit for fear that he may thereby become liable in a second suit") (internal quotations and citation omitted); *see also Paparo v. United Parcel Svc., Inc.*, 43 F.Supp.2d 547, 551 (E.D.Pa.1999) (holding that plaintiff's allegations that defendant "defended against an action ... cannot form the basis of a claim for wrongful use of civil proceedings").

arbitrators" and the "overbreadth" of the arbitration. (Def. Motion at 19-20). Plaintiffs dispute each of Defendants' allegations and further argue that such allegations would require a "factually intensive inquiry" and, thus, cannot be dismissed at the motion to dismiss stage.

*9 This Court agrees with Plaintiff that Defendants' allegations concerning the probable cause issue are factually based and are not appropriate for resolution upon a motion to dismiss. The Court also notes that in a post-briefing letter and again at oral argument, Defendants' counsel alerted this Court to the recent rulings by the Orphans' Court, granting Defendants' petitions for vacatur and recusal. However, this Court finds that the ultimate decisions of the Orphans' Court have no bearing on the issue of whether Defendants had probable cause at the time they filed their petitions. Accordingly, this Court does not take into consideration the outcome of these petitions. The Court finds that the issue of probable cause remains a factual issue that cannot be disposed of on a motion to dismiss.

Finally, although neither party specifically addressed the last element of the claim, i.e., that the proceedings were instituted primarily for an improper cause, the Court finds this issue also necessitates a factual inquiry into the intent of Defendants. Thus, this issue is similarly inappropriate for disposition at this juncture.

Despite the Court's determination that both the probable cause issue and the improper cause issue cannot be resolved at this stage, Defendants are nevertheless entitled to dismissal of Plaintiff's claim

for wrongful use of civil proceedings because Plaintiff lacks standing to bring such claim and has failed to establish at least one of the necessary elements.

V. CONCLUSION

For the aforementioned reasons, Defendant's motion to dismiss the Complaint is granted. An appropriate Order will issue this date.

ORDER

THIS MATTER having come before the Court upon Defendants' motion to dismiss the Complaint; and the Court having considered the moving papers, and the opposition thereto; and the Court having heard oral argument from the parties; and for the reasons expressed in the Opinion issued this date;

IT IS HEREBY **ORDERED** that Defendants' motion to dismiss the Complaint is **GRANTED**; and

IT IS FURTHER **ORDERED** that this case be closed.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-2527

EDWIN E. NAYTHONS
Appellant

v.

STRADLEY, RONAN [sic], STEVENS & YOUNG LLP AND ANDRE L. DENNIS, ESQ.
Appellees

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and *ROTH, Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available

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* Judge Roth's vote is limited to panel rehearing only.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT:

/s/ Julio M. Fuentes
Circuit Judge

DATED: August 26, 2009

tmk/cc: George A. Bochetto, Esq.
David P. Heim, Esq.
Joseph C. Crawford, Esq.
Andrea Toy Ohta, Esq.